No. 14560

IN THE

United States Court of Appeals

For The Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, Appellant, vs. AUDRA H. PALMER, Appellee.	Appeal from the United States District Court for the District of Arizona

REPLY BRIEF OF APPELLANT

SCOVILLE & LINTON

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REPLY BRIEF OF APPELLANT

I.

Reply To Contention of Appellee That Nollner's Absence Was Not Prejudicial.

Appellee on page 9 of her Brief admits that failure of the insured to attend may under some circumstances constitute a breach of the cooperation clause in the Defendant's insurance policy and goes further to state that failure of the insured to attend trial does not under all circumstances constitute a breach of the cooperation clause; and, in proof of this, Appellee cites numerous cases on pages 10 and 11 of her Brief, which cases are

distinguishable. We shall discuss the cases that relate to failure of the insured to attend the trial, since many of the cases set forth on pages 10 and 11 of Appellee's Brief do not relate to that fact but to other elements not material to the decision of this matter. A majority of the cases cited do not relate to failure to appear. We shall first discuss all of the Federal cases and then only the state cases that relate to failure to appear at trial.

The first case cited is a case decided by this Honorable Court, being *Standard Acc. Ins. Co. of Dertoit, Mich. v. Winget,* (C.A. 9), 197 Fed. (2d) 97, 34 A.L.R. (2d) 250. In that case the insured at the time of his deposition stated that he had not been drinking but later, and prior to the trial, he changed his statement and admitted that he had had a certain amount of intoxicating beverages and, further, in that case there was no evidence at the trial concerning intoxication.

The next Federal case cited is the case of *Norwich Union Indem. Co. v. Haas,* (C.A. 7), 179 Fed. (2d) 827, which involved a misstatement by the insured as to where he had been on the night of the accident. He later changed his story prior to trial and the insurer's agent knew that the original statement was false. Therefore, there was no prejudice at the time of the trial.

Next is cited the Fifth Circuit case of *General Acc. Fire & Life Assur. Corp. v. Reinert,* (C.A. 5), 170 Fed. (2d) 440. There the insured's daughter made a false statement immediately after the accident to the effect that she was driving the car, when, in fact, a friend had been permitted by her to drive. Five days after the date of the accident she made a correct statement to the insurer.

The Fourth Circuit case of *State Automobile Mut. Ins. Co. v. York,* (C.C.A. 4), 104 Fed. (2d) 730, was an action brought by the wife against the husband who was the insured, and the only lack of cooperation shown was that the husband was angry when charged with collusion, refused to sign certain pleadings, and did not make any suggestions during the trial and was pleased with the verdict. In this case there were some discrepancies in the

statement concerning facts of the accident which related to opinions alone. The insured was not called by appellant's counsel to testify at the trial in the lower Court.

The Ninth Circuit case of *Pacific Indemnity Co. v. McDonald,* (C.C.A. 9), 107 Fed. (2d) 446, was a case where the insured gave an incorrect story as to how the accident occurred. His story was corrected a week later and, in addition, there was a question as to the proper wording of the answer prepared by the company's attorney.

The first of the Federal decisions relating to failure to appear is the case of *State Farm Mut. Auto Ins. Co. v. Koval* (C.C.A. 10), 146 Fed. (2d) 118. In this case the insured did not attend the trial; however, the insurer's counsel admitted that the insured was guilty of negligence in his pleadings. The Court stated as follows:

> "In the ordinary case, the absence of the defendant from the trial would hamper the insurance company in presenting its defense."

The above case is certainly distinguishable from the case at bar where the question of negligence was contested, and we respectfully submit that the Court was referring to a case of questionable negligence when it used the phrase "in the ordinary case".

The case of *Associated Indemnity Corp. v. Davis* (C.C.A. 3), 136 Fed. (2d) 71, is clearly distinguishable from the case at bar. In that case the insured refused to attend the first trial; a continuance was obtained; the company withdrew; and thereafter the insured repented and agreed to appear at the next trial.

We will next discuss the state cases cited that deal with the question of failure to appear at the trial. The first of such cases is that of *George v. Employers' Liability Assur. Corp.,* 219 Ala. 307, 122 So. 175, 72 A.L.R. 1438. This case is distinguishable from the case at bar since, first, the company did not tender the expenses, as was required, and, additionally, there were other witnesses who could testify to the same facts. In the case at bar,

Nollner was the only witness for the Defendant who could testify as to all of the facts of the accident.

The case of *Hynding v. Home Acc. Ins. Co.,* 214 Cal. 743, 7 P. 2d 999, 85 A.L.R. 13, was one where the insured failed to appear for the trial and the court in that case held that the insurer was *clearly* prejudiced by the failure of the insured to appear for the trial. This case has been cited numerous times, although not altogether on the point above set forth.

The case of *Panhans v. Associated Indemnity Corp.,* 8 Cal. App. 2d 532, 47 P. 2d 791, is distinguishable since the insured's written statement showed he could not have testified favorably for the defense on the issue of negligence. Also in that case, the insurer withdrew three weeks prior to the trial after having written a number of letters to the insured which were not answered and letters advising of the trial date were returned undelivered.

The case of *Norton v. Central Surety & Insurance Co.,* 9 Cal. App. 2d 598, 51 P. 2d 113, is distinguishable from the case at bar since in that case the insured was actually present at the trial and testified as a witness; however, non-cooperation was claimed because of the failure to appear until the afternoon of the day before the trial. The insured then told the company's attorney that he would not be at the trial and, if forced to come, his testimony would not be favorable. It was then that the company disclaimed liability. Apparently, however, the insurer continued with the trial of the case and the insured appeared at the trial and testified.

In the case of *Jenson v. Eureka Casualty Co.,* 10 Cal. App. 2d 706, 52 P. 2d 540, the distinguishing factors are that there was no evidence that the insured was told he had to appear for the trial and it could not be found that he wilfully failed to appear.

The case of *Wormington v. Associated Indemnity Corp.,* 13 Cal. App. 2d 321, 56 P. 2d, 1254, is the only case that we can find that should give any comfort to Appellee. Yet this case is not too clear as to what actually happened except the bare state-

ment that the insured did not attend the trial of the suit. In this case the Court stated, among other things:

> "In our opinion, the finding of the trial court that the assured fully co-operated with the defendant insurance company in the preparation of the defense of said action, and that, if there was any lack of co-operation on the part of said assured, the same was not prejudicial, must, in view of the conflict in the evidence with regard to assured's conduct, be upheld, because of the substantiality of the evidence to sustain the decision arrived at by the trial court upon this issue."

We do not know from reading the case what the Court meant when it said "because of the substantiality of evidence to sustain the decision arrived at by the trial court on this issue." The case does not indicate whether or not there was a disputed fact question, and, for some reason, this case has not been followed or cited as has the *Hynding v. Home Acc. Ins. Co.* case, supra, which held the insurer was clearly prejudiced by such failure.

In the Florida case of *American F. & Cas. Co. v. Vliet,* 148 Fla. 568, 4 So. (2d) 862, the assured did not appear at the trial but in that case there was no tender of expenses.

In the Kentucky case of *Metropolitan Cas. Ins. Co. of New York v. Albritton,* 214 Ky. 16, 282 S.W. 187, the policy itself did not require the attendance of the assured at the trial and in that case the company actually tried the case.

The Michigan case of *Kennedy v. Dashner (Preferred Automobile Ins. Co., Garnishee),* 319 Mich. 491, 30 N.W. (2d) 46, is certainly distinguishable as disclosed by this statement from the Court:

> "The record does not disclose that Dashner could have been of any assistance at the trial if he had been present. He was not an occupant of the car at the time of the accident, and probably could have offered no testimony pertaining thereto."

In the Missouri case of *Finkle v. Western Automobile Ins. Co.,* 224 Mo. App. 285, 30 N.W. (2d) 46, that policy did not require attendance at the trial and no effort was made to locate the

assured until two weeks before the trial and further the company did not withdraw until the second day of the trial. This case was distinguished by the Missouri Court in the case of *Bauman vs. Western and Southern Indemnity Co.,* 230 M.A. 835, 77 S.W. (2d) 496, referred to in our opening brief on pages 27 and 49.

In the Pennsylvania case of *Conroy v. Commercial Casualty Ins. Co.,* 292 Pa. 219, 140 Atl. 905, the Court states:

> "If the insured refuses to give any information, so that the company is unable to make defense, it cannot be said there is cooperation, and in that case, a recovery should be denied. Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367; 126 Misc. Reports, 380; 213 N.Y.S. 522. The same is true if he absents himself so that his evidence cannot be taken advantage of."

In the Pennsylvania case of *Bachman v. Monte,* 326 Pa. 289, 192 Atl. 485, there was evidence of unquestioned collusion between the insurance company agent and the insured in causing him not to appear at the trial.

In the other Pennsylvania case cited, *Cameron v. Berger,* 336 Pa. 229, 7 Atl. (2d) 293, the insured disappeared from her home to avoid arrest and was not present at the trial, and the company finally disclaimed responsibility by letters written to the insured. The Court held that failure to appear was, as a matter of law, lack of cooperation and that the breach was material.

The last case cited on page 11, relating to failure of the insured to appear, *Lienhard v. Northwestern Mutual Fire Ass'n,* 187 Wash. 47, 59 P. 2d 916, is distinguishable since the insurer did not withdraw until after the selection of the jury and there was no tender of expenses to the insured as was requested.

The texts cited on page 11 do not in any way hold that failure to attend the trial is not prejudicial. There are cases which have a specific holding that failure to attend trial as a matter of law is prejudicial. *Hynding v. Home Acc. Ins. Co.,* supra; *Schneider v. Autoist Mutual Ins. Co.,* 346 Ill. 137; 178 N.E. 466.

In the case of *Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co.,* 203 App. Div. 796, 197 N.Y.S. 606, the court stated:

> "I think that the condition of the policy requiring co-operation on the part of the assured in the defense of the action brought against him by the injured party is one of great importance. Without the presence of the assured and his aid in preparing the case for trial, the insurance company is handicapped and such lack of co-operation may result in making the action incapable of defense. In the case at bar, the statement made to the insurance company that the chauffeur was using the automobile for his own purposes without permission of the assured, constituted, if true, a perfect defense to the action brought by the injured party. To enable the company to defend the action it was manifestly essential that the assured be present and be examined in his own behalf as a witness upon the trial. This, by reason of his disappearance, was impossible."

II.

Reply To Contention of Appellee That Nollner's Presence Was Not Necessary.

We feel that we should point out to the Court that Nollner and his deceased wife had been friends with Mrs. Palmer for some years and had lived in the same household for sometime prior to the accident. (R. 210)

In the case of *State Automobile Mut. Ins. Co. v. York,* supra, the court stated:

> "Where such relationship exists, however, the conduct and testimony of the parties should be carefully scrutinized by court and jury, since the interest of the parties is not really adverse."

In that case the wife sued the husband under the insurance policy. It is true that no husband and wife relationship existed in the case at bar but there was a friendly relationship which we maintain cannot be overlooked. In view of this, let us explore the possible dangers of a holding that the failure to appear at a trial does not prejudice the defendant as a matter of law when the facts of negligence are disputed. An insured, friendly with a guest passenger in his automobile, could easily collude against the insurance

company for the financial gain of the plaintiff, and refuse to attend the trial. Nollner well knew that his testimony would show no liability on his part. Might it not be said that he well knew that his presence as a witness and his testimony under oath would at least tend to cause him to defeat the recovery of his friend, the plaintiff? A ruling holding that attendance at the trial of the case, when the facts of the case are disputed, is not prejudicial, could easily mean that all insurance companies would be at the mercy of collusion between an insured and a friendly plaintiff, be it a guest passenger or otherwise.

Perhaps this sounds remote in this particular instance but we cannot overlook the relationship of the parties, nor can we overlook the evidence which we contend was inadmissable hearsay evidence that constituted the second paragraph of Finding of Fact No. 7. Close examination will point out that that statement was written on July 8, 1950. Now we would like to point out the wording in the deposition of Mr. Nollner on July 21, 1950, this time under oath, which was as follows:

"Q. (Mr. Romley) Has Mr. Eckroth or any of the gentlemen here in Denver or Mr. Linton suggested to you that it would be all right for you not to go?

"A. (Mr. Nollner) No, no, no; they insisted I do.

"Q. Was it finally decided by all of the parties you have mentioned that you could not jeopardize your work and your job, that you should stay here?

"A. No. I decided that myself.

"Q. You are sure of that?

"A. I am positive of that.

"Q. None of them suggested to you that it would be better to wait and go later?

"A. Oh, no. no. In fact, I was warned it might fall right in my lap and I said, 'That's a responsibility I have to take'. I am taking it, and not until the 14th or 15th did I know that the trial had been postponed." (R. 235-236)

We feel that the above certainly disproves the wording contained in Finding of Fact No. 7 since it was subsequent and under oath but it certainly tends to show what could happen in such a case if collusion was desired between the plaintiff and the insured. The insured might not hesitate to say or write certain things not under oath but be fearful of attending the trial, knowing that he would have to tell the truth and thereby defeat his friend's claim. We feel that this Honorable Court should as a matter of law hold that where the facts of the accident are in serious dispute, the failure of the assured to attend the trial is prejudicial to the insurer.

Appellee contends that Nollner cared a great deal about the trial and wanted to attend the trial and but for the fact of illness of other employees and his work, he would have done so. Appellee attempts to criticize counsel for defendant for allowing the trial to be set on December 19, 1950 near the Christmas holidays and goes into flowery detail complimenting the Salvation Army's work, which certainly is immaterial to the issues.

Appellee apparently overlooks the statements of Nollner appearing in Defendant's Exhibit 25 at page 244 of the Transcript of Record, where he stated that his superior had left it entirely to his (Nollner's) discretion and that he (Nollner) decided not to go to Phoenix and further stated that he would not state whether or not he would go to Phoenix if another postponement was obtained. Testimony showing the same points was covered in our Opening Brief on pages 21, 22 and 23.

III.

Answer To Appellee's Contention That Appellant Waived Nollner's Absence.

Appellee apparently overlooks the well-known fact that a liability insurance policy, such as this, has in it two types of insuring clauses: one, to pay up to the limits of the policy on behalf of the insured all sums which the insured shall become obligated to pay by reason of liability imposed upon him by law for damages;

second, the insuring provision that the company shall defend in his name and behalf any suit against the insured even if the suit is groundless, false or fraudulent.

When Appellee contends that Appellant's counsel violated a solemn duty to Nollner, she overlooks the fact that as regards the coverage of Nollner relating to his defense, this is strictly a personal right between the insurer and the insured. The plaintiff or judgment creditor cannot complain if the company does not defend the insured. The insured always has the right, if the company wrongfully refuses to defend, to employ his own attorney and sue the company for the costs of defense guaranteed under the policy. This right is separate and distinct from the right of the defendant to have the company pay the judgment up to the policy limits, and that right is the only one that the judgment creditor can enforce against the insurance company.

The motion for continuance made at Nollner's request was denied on January 10, 1951. (R. 118, lines 20, 21, 22, 23 and 24; R. 121, lines 4 and 5). Prior to that time and at 3:30 p.m. of that day, as appears in Defendant's Exhibit No. 25 (R. 241), the insured in Denver had refused to come to the trial although he was free to do so. Thereafter and at noon on January 11, 1951 a motion was filed to allow the insurance company's attorneys to withdraw (R. 121, lines 25, 26 and 27). Appellee apparently agrees with the chronological course of events above set forth since they are admitted in the second paragraph of page 3 of Appellee's brief and in the first paragraph of page 7 thereof. Therefore, at the time the proffered offers contained in Finding of Fact No. 9 were made, the motion for continuance had been denied, the assured had been advised of the withdrawal of coverage and defense because of lack of cooperation (R. 254, 255 and 256) and counsel for Appellant was arguing his motion for leave to withdraw.

A greater part of Appellee's contention in this case is based upon what happened during the argument of the motion for leave to withdraw and relates to purported duties of insurer's

counsel at that time. That, we submit, has nothing to do with the true issue of the case since it is argument concerning a matter in which Appellee has no rights. If Nollner had employed his own attorneys after being notified of the withdrawal by the insurance company, and, if such withdrawal was wrongful, he might have had a cause of action against the Appellant but certainly the Appellee can have no interest in that cause of action nor can Appellee complain because no defense was offered but only that coverage as to the third party was denied.

There is nothing that the Plaintiff could do to cure Nollner's breach of his failure to cooperate in argument on the motion for counsel to withdraw. Continuing the case would not do that; neither would the admission of a deposition of Nollner which was strictly procedural and was a matter of right if the witness was more than fifty miles from the court. 21-707 ACA 1939. Neither could this be cured by Appellee's waiver of a jury.

A great deal of Appellee's brief is also taken up with purported inferences showing that the company was laying the groundwork for a withdrawal from the case because of lack of cooperation by not attending the trial. Certainly an insurance company has the right to demand compliance with conditions of its policies and should advise its insureds what would happen if the insured should fail to comply, and there is no reason why the company should not advise its agents to so advise an insured at all times.

IV.

Reply To Contention That Nollner's Presence Was Not Necessary.

Appellee very cagily avoids the inescapable conclusion that Appellant's attorney, or any trial attorney, would have drawn as to the danger of trying a cause to the court or jury in a disputed factual situation when advised another witness (Height, driver of the truck) would be there to testify as to the facts of the accident. (R. 180-181) Appellee passes that by by merely stating that there was no testimony in the District Court trial to the effect that Appellant's counsel was surprised at any testimony in the Superior

Court trial. He is in effect stating that after the case is tried, it should be determined by the Appellant whether or not the presence of the defendant was necessary. We respectfully submit that that is a matter that could only be determined on the basis of the state of the evidence known prior to commencing the trial. If it were a case where liability was admitted, we could not help but agree with counsel for Appellee but in a case where liability was disputed and Appellant's attorneys below were confronted with the possibility of surprise testimony (promised by plaintiff's attorney prior to trial in the lower court), certainly we submit as a matter of law, Nollner's presence was necessary at the trial to properly allow the Appellant to defend under the policy and therefore his failure was a breach of the cooperation clause and clearly prejudicial to Appellant.

Summary of Argument

Appellant has replied to the argument of Appellee as to the vital points raised in Appellee's brief. We feel that Appellant's opening brief amply sets forth the issues on all of the other matters not touched upon in this Reply Brief; and, because of time and space limitations, we have felt it unwise to belabor further argument on those points.

It is respectfully submitted that the decision should be reversed because—

First: There is no showing of bad faith on the part of Appellant and Appellant did all it was required to do to obtain Nollner's presence at the trial.

Second: Nollner's presence was inexcusable for he could have attended the trial had he wanted to do so.

Third: Nollner's presence at the trial was necessary, particularly in view of the fact that this was a case, not where liability was admitted, but where the insured was the driver of the car and the only eye witness favorable to the defendant, in a case where there was a disputed fact situation concerning liability.

Fourth: The Appellant did not waive Nollner's absence. The requirement that the insured attend the trial was a material condition of the policy and the Appellant was prejudiced as a matter of law by Nollner's unexcused failure to appear and therefore the Appellee was not entitled to recover from Appellant.

Conclusion

The judgment should be reversed with directions to enter judgment for the Defendant-Appellant.

Respectfully submitted:

SCOVILLE & LINTON

By WALTER LINTON
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Attorneys for Appellant

No. 14,560

United States Court of Appeals

For the Ninth Circuit

State Farm Mutual Automobile Insurance Company, a corporation,
Appellant,

vs.

Audra H. Palmer,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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No. 14,560

United States Court of Appeals

For the Ninth Circuit

State Farm Mutual Automobile Insurance Company, a corporation, *Appellant,*
vs.
Audra H. Palmer, *Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant respectfully petitions for a rehearing in the above matter to the end that the order dismissing the appeal be vacated and the appeal be heard on its merits.

GROUNDS FOR A REHEARING.

We do not lightly regard the filing of a petition for rehearing.

We respectfully urge that the opinion and order dismissing the appeal and denying a hearing on the merits runs counter (i) to the spirit and purpose of the Rules of Civil Procedure, particularly Rule 61, (ii) to cognate portions of the Judicial Code, particularly 28 U.S.C.A. § 2111, and (iii) to decisions of this Court and the Supreme Court of the United States which have construed such provisions, particularly *Hoiness v. United States* (1948), 335 U.S. 297 and *United States v. Arizona* (1953), 346 U.S. 907.

Well within the time required for the filing of notice of appeal, appellant filed a document reading as follows (Tr. 48-49):

> "[Title of District Court and Cause.]
>
> NOTICE OF APPEAL
>
> Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%)

per annum from January 18, 1951, and together with Plaintiff's costs incurred therein.

Dated this 17th day of September, 1954.

Scoville & Linton,
By /s/ Walter Linton,
Attorneys for Defendant, State Farm Mutual Automobile Insurance Company, a Corporation.

[Endorsed]: Filed September 17, 1954."

We believe that the opinion errs when it holds that this document was insufficient to invoke the appellate jurisdiction of this Court to review the judgment in this case. Such judgment, so far as it is at all formalized (apart from the findings of fact and conclusions of law), appears as follows in an entry in the Civil Docket (Tr. 42):

"Date Filings—Proceedings

* * *

July 6, 1954 6:00 p.m. Enter judgment for the plaintiff Audra H. Palmer against defendant State Farm Mutual Automobile Insurance Company, a corporation, in the sum of $10,000.00, together with interest thereon at the rate of six per cent per annum from January 18, 1951, until paid, together with her costs herein incurred."

ARGUMENT.

I.

THE NOTICE OF APPEAL, EVEN THOUGH IT REFERRED TO THE DATE ON WHICH THE MOTION FOR NEW TRIAL WAS DENIED, WAS SUFFICIENT TO INVOKE THE APPELLATE JURISDICTION OF THIS COURT TO REVIEW THE FINAL JUDGMENT ENTERED IN THIS CASE.

The sole question in this case is not whether the order of August 24, 1954 was an appealable order, but whether the Notice of Appeal filed by the Appellant was sufficient in form to invoke the appellate jurisdiction of this Court to review the final judgment in this case.

There was only one final judgment. It awarded the plaintiff (respondent) the sum of $10,000.00, together with interest thereon at the rate of six per cent per annum from January 18, 1951, together with her costs. The terms of that judgment were embraced in the entry in the civil docket (Tr. 42), and they were set out *in haec verba* in the Notice of Appeal filed by Appellant (Tr. 48-49). We cannot believe that the Notice of Appeal was ineffective because it referred also to the date on which the order denying the motion for a new trial was entered.

A notice of appeal in substantially the same form was held sufficient by the Supreme Court of the United States in *United States v. Ellicott* (1912), 223 U.S. 524. In that case the final judgment was entered against the United States on *May 18, 1908;* the United States filed a motion for new trial which was overruled on *January 4, 1909;* various other motions were

then made and ruled upon and on February 25, 1909 the United States gave notice of appeal and in its notice of appeal specified that it was appealing *"from the judgment rendered in the above-entitled cause on the 4th day of January, 1909.*

The appellee filed a motion to dismiss the appeal on the ground that it was not from a final judgment "but was merely from the order overruling the motion for a new trial." The Supreme Court summarily denied the motion to dismiss, stating "The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees . . . treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing . . . has been disposed of; and the time for appeal begins to run from the date of such disposition."

To the same effect see *Texas-Pacific Railway Company* (1884), 111 U.S. 488, and cases cited in Appellant's Reply to Appellee's Motion to Dismiss.

We believe that the form of the notice of appeal filed by the Appellant in the instant case is clearly distinguishable from the form of the notice filed in *Libby, McNeill & Libby v. Alaska Industrial Board,* C.C.A. 9 (1954), 215 Fed. 2d 781, upon which this Court relied in its opinion. In that case the notice of appeal did not refer to any judgment, but, apparently, referred only to a "minute order" denying the motion for new trial. In that respect we submit

that there is a very substantial difference between the notice of appeal involved in the *Libby, McNeill & Libby* case and the notice of appeal filed by us, since our notice of appeal set out in precise terms the judgment complained of.

In addition, we believe that the rule followed by this court in *Libby, McNeill & Libby* runs counter to the rule followed by the United States Supreme Court in *United States v. Ellicott,* supra, and to numerous other cases,* many of which were cited in the memorandum filed by appellant in opposition to the motion to dismiss.

In the discussion just set forth we have shown that numerous courts hold that a notice of appeal which refers only to the date upon which a motion for new trial was denied is sufficient to invoke the Appellate jurisdiction of the court.

Our notice of appeal went much further than the notices of appeal which have been held sufficient in the cases referred to because it actually set out the terms of the judgment complained of. Had our notice

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*See for example: *Wilson v. So. Rwy.,* C. C. A. 5 (1945), 147 Fed. 2d 165; *Bates v. Batte,* C. C. A. 5 (1951), 187 Fed. 2d 142; *Inland Freight Lines v. United States,* C. C. A. 10 (1951), 191 Fed. 2d 313; *Porter v. Borden's Dairy,* C. C. A. 9 (1946), 156 Fed. 2d 798; *Wetherbee v. Elgin Etc. Co.,* C. C. A. 7 (1953), 204 Fed. 2d 755; *Shannon v. Retail Clerks etc. Assn.,* C. C. A. 7 (1942), 128 Fed. 2d 553; *Sun-Lite etc. Co. v. Conklin Aviation Corporation,* C. C. A. 4 (1949), 176 Fed. 2d 344; *Sobel v. Diatz,* U. S. Ct. App., Dist of Col. (1951), 189 Fed. 2d 26; *Safeway Stores v. Coe,* U. S. Ct. App., Dist. of Col. (1943), 136 Fed. 2d 771.

of appeal merely eliminated any reference to the order of August 24, 1954 (that is had the words commencing with "order" and ending with "grants" been eliminated from the notice of appeal) even the most highly technical application of the rules invoked by appellee could not have rendered out notice of appeal subject to the objections here urged.

That technicalities should not be relied upon to abort an appeal appears well established by the doctrines which we now discuss.

II.

THE DEFECT (IF ANY) IN THE NOTICE OF APPEAL WAS OF SUCH A TECHNICAL NATURE THAT IT SHOULD HAVE BEEN DISREGARDED IN ACCORDANCE WITH THE POLICY EXPRESSED IN THE FEDERAL RULES OF CIVIL PROCEDURE AND IN THE JUDICIAL CODE AND THE DECISIONS WHICH HAVE CONSTRUED THEM.

Eliminating any reference to the order of August 24, 1954, our notice of appeal would read as follows:

> "Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the . . . judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

We respectfully submit that adding to the above a reference to the order of August 24—or designating the order of August 24 instead of the order of July 6—is not such a departure from the rules as warrants the drastic action of dismissing an appeal without hearing it on the merits.

As stated by Chief Judge Denman in *Cutting v. Bullerdick*, C.C.A. 9 (1949), 178 Fed. 2d 774, "The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited . . . "

The author of the opinion quoted with approval from *R. F. C. v. Prudence Securities, etc. Group* (1941), 311 U.S. 579, where the court stated (p. 582)

> "The procedure followed by the petitioners was irregular . . . But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The Court has discretion where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice."

As stated in 13 *Cyclopedia of Federal Procedure,* page 473, Sec. 60.94:

> "If the notice is sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment."

We respectfully submit that this Court in its discussion of *Hoiness v. United States* (1948), 335 U.S.

297, overlooks the fact that, although that case involved 28 U.S.C.A. § 777, which has been repealed, it is still authority for the rules stated therein because of the fact that the provisions of 28 U.S.C.A. § 777 have been embodied in Rule 61 of the Federal Rules of Civil Procedure.

In this connection it is to be noted that the Advisory Committee on Rules in its comment on Rule 61 stated (14 Cyc. Fed. Proc. Sec. 68.55) that it was:

> "A combination of U. S. C. A., Title 28, § 2111, former § 391 (New Trials; harmless error) and former § 777 (Defects of form, amendments) with modifications. See McCandless v. United States 1936, 56 S. Ct. 764, 298 U. S. 342, 80 L. Ed. 1205. Compare former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally)."

See also:

Crump v. Hill, C.C.A. 5 (1939), 104 Fed. 2d 36.

Furthermore, it is to be recalled that in the opinion of the Supreme Court in the *Hoiness* case the footnote referring to the repeal of § 777 ended with "and see Rules 1, 15, 61 and 81 Rules of Civil Procedure."

Again, this Court (in the footnote on page 2 of its opinion) in distinguishing the *Hoiness* case says:

> "It should be noted that the statute, 28 U. S. C. (1946 Ed.) § 777, does not apply to this case because the action was not pending prior to the repeal of that section."

It is quite true that § 777 had been repealed prior to the taking of the appeal in the instant case. However, it lives on in Rule 61, Rules of Civil Procedure, which also embodies 28 U.S.C.A. § 2111 (set out in the margin).*

The rule of the *Hoiness* case, accordingly, is still in effect and requires (we respectfully submit) that the appeal in this case be heard on its merits. In the *Hoiness* case, the Court in speaking of the Notice of Appeal said that the "defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress" in 28 U.S.C.A. § 777.

The last clause of § 777 provided that the ". . . *Court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, . . .*" This language, we submit, is in substantially the same form as the last sentence of Rule 61 reading *"The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial right of the parties."*

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*28 U.S.C.A. §2111: ("On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").

This court in a footnote in its opinion also refers to *United States v. State of Arizona*, C.C.A. 9 (1953), 206 Fed. 2d 159 and 346 U.S. 907, and points out that "The Rules of Civil Procedure do not affect this situation. No appeal lies unless taken from a 'final decision'."

For reasons above stated we submit that the Rules of Civil Procedure, particularly Rule 61, do apply to this situation and that the appeal in this instance (as we have already shown) was in fact taken from a "final decision".

We believe that the *Hoiness* case stands for the proposition that where the notice of appeal sufficiently apprises the appellee of the judgment from which appeal is taken, any technical deficiency in specifying the judgment must be disregarded. "No one was misled or injured." (*Voehl v. Indemnity Insurance Co.* (1933), 288 U.S. 162 at 177.)

Again, if the Notice of Appeal in our case had simply eliminated any reference whatsoever to the order of August 24, 1954, not even the most hypertechnical construction of the rules and statutes dealing with appeal could in any wise have impeached its validity, or in any way have been used as the predicate for a claim that it was insufficient as a matter of law to invoke the appellate jurisdiction of this court to review the judgment in this case.

III.

CONCLUSION.

In conclusion, it is respectfully submitted that a rehearing should be granted in this case.

Dated, San Francisco, California,
April 20, 1955.

Respectfully submitted,
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Certificate of Counsel.

In my judgment the foregoing petition for rehearing is well founded. I hereby certify that it is not interposed for delay.

Dated, San Francisco, California,
April 20, 1955.

R. S. Cathcart.